

Part III - Administrative, Procedural, and Miscellaneous

Extension of Interim Guidance on Section 67 Limitations on Estates or Trusts

Notice 2008-116

PURPOSE

This notice extends to taxable years that begin before January 1, 2009, the interim guidance provided in Notice 2008-32, 2008-11 I.R.B. 593, on the treatment under § 67 of the Internal Revenue Code of investment advisory costs and other costs subject to the 2-percent floor under § 67(a) that are integrated as part of one commission or fee paid to the trustee or executor (“Bundled Fiduciary Fee”) and are incurred by a trust other than a grantor trust (nongrantor trust) or an estate. Notice 2008-32 is modified and superseded.

BACKGROUND

On January 16, 2008, the Supreme Court of the United States issued its decision in Michael J. Knight, Trustee of William L. Rudkin Testamentary Trust v. Commissioner, 552 U.S. ___, 128 S. Ct. 782 (2008), holding that costs paid to an investment advisor by a nongrantor trust or estate generally are subject to the 2-percent floor for

miscellaneous itemized deductions under § 67(a). The IRS and the Treasury Department expect to issue regulations under § 1.67-4 of the Income Tax Regulations consistent with the Supreme Court's holding in Knight. The regulations also will address the issue raised when a nongrantor trust or estate pays a Bundled Fiduciary Fee for costs incurred in-house by the fiduciary, some of which are subject to the 2-percent floor and some of which are fully deductible without regard to the 2-percent floor. The regulations, however, will not be issued in time to be applicable to the 2008 taxable year.

Notice 2008-32 provides interim guidance that specifically addresses the treatment of a Bundled Fiduciary Fee. In short, Notice 2008-32 provides that taxpayers will not be required to determine the portion of a Bundled Fiduciary Fee that is subject to the 2-percent floor under § 67 for any taxable year beginning before January 1, 2008.

EXTENSION OF INTERIM GUIDANCE

Taxpayers will not be required to determine the portion of a Bundled Fiduciary Fee that is subject to the 2-percent floor under § 67 for any taxable year beginning before January 1, 2009. Instead, for each such taxable year, taxpayers may deduct the full amount of the Bundled Fiduciary Fee without regard to the 2-percent floor.

Payments by the fiduciary to third parties for expenses subject to the 2-percent floor are readily identifiable and must be treated separately from the otherwise Bundled Fiduciary Fee.

EFFECT ON OTHER DOCUMENTS

Notice 2008-32 is modified and superseded.

CONTACT INFORMATION

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